

AUG 01 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONRADO MARTINEZ-ARELLANO,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-71449

Agency No. A72-321-022

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted July 24, 2006 ^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Conrado Martinez-Arellano, a native and citizen of Mexico, petitions for review of the Board of Immigrations Appeals' ("BIA") order summarily affirming an immigration judge's ("IJ") order denying his motion to reopen removal

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

proceedings held in absentia. We have jurisdiction under 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen. *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000). We grant in part and dismiss in part the petition for review.

The IJ abused her discretion in denying the motion to reopen because Martinez-Arellano's evidence from the University of California medical center that he suffered fevers and vomiting on the day of the hearing demonstrated an "exceptional circumstance" beyond his control. *See* 8 U.S.C. § 1229a(e)(1).

We lack jurisdiction to review Petitioner's contention that he was denied due process due to ineffective assistance of counsel because he failed to raise this contention before the agency. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (explaining that exhaustion is jurisdictional); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000) (holding that petitioner must exhaust administrative remedies by first presenting ineffective assistance of counsel claim to the agency).

**PETITION FOR REVIEW GRANTED in part, DISMISSED in part;
REMANDED.**